THE DEFENCE OF CONSENT, COERCION AND NECESSITY UNDER THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

By: Dejene Girma J[1]

Introduction

It is not unusual for individuals to engage in the commission of criminal activities. But since the commission of crimes is contrary to public interests the society tries to deter these individuals from such anti-social activities by using different means, in particular, punishment. Nevertheless, the society is not to use punishment all time criminal law is violated. There are instances where individuals who violated criminal law are let go free despite the fulfillment of all the underlying requirements for the existence of punishable crime. Such instances come into picture where there are criminal law defences available to perpetrators. Among these defences consent of the victim, coercion, and necessity are some. From these defences the defence of consent of the victim was not recognized under the 1957 penal code of Ethiopia. The 2004 Criminal Code of the Federal Democratic Republic of Ethiopia (the "New Code or Criminal Code" hereinafter) seems to recognize this defence. The other two defences were recognized under both Codes. But there are new introduction by the New Code to these two defences. In short, this article deals with these three criminal law defences because it is only in relation to these three concepts in the catalogue of defences that the New Code has made significant Changes. So the article aims at elucidating the changes made, their extent, and the changes that should have been made, if any.

There are few points that readers need to know in advance. Firstly, the 2004 Criminal Code of the Federal Democratic Republic of Ethiopia is not published in Negarit Gazeta as required by Art. 2(2) of the Federal Negarit Gazeta Establishment Proclamation No. 3/1995, and also as it is the case in relation to the other codes we currently have. Hence, it is doubtful whether it is legally speaking a law. All the same, since, currently, courts are applying and also since the absence of the expression rendering it a law may be a typographical error it is, in this article, treated as a law. Secondly, all the legal provisions

[1] Assistant Lecturer, Faculty of Law, Jimma University

cited in this article without their sources being indicated are the provisions of the 2004 Criminal Code unless their contexts dictate otherwise.

A. Consent of the Victim

It is not the case that crimes are always committed contrary to the will of the victim. At times victims may initiate or invite the doing of harms onto themselves. For instance, euthanasia refers to homicide committed upon the consent of the victim. Should, therefore, the victimizer be allowed to invoke the consent he has secured from the victim as a defence? This issue presupposes another issue; that is, who is the victim of a criminal act.

Criminal matters are, by their nature, not individual matters but public matters. Hence, crimes are harms to the public, not to individuals. If this is so, it would be illogical to argue that individuals can license the doing of harm to the public.[1] It is for this reason that their consent is generally not believed to be a defence against punishment. If it is to serve as a defence it has to be obtained from the public, not from the direct victim of the criminal act.

All the same, the absence of defence based on the consent of the victim is just a rule. Hence, consent of the victim can serve as a defence under exceptional circumstances. For example, in some jurisdictions "consent of a victim is a defence when it negatives an element of the offence or precludes infliction of harm to be prevented by the law defining the harm".[2] In these jurisdictions consent serves as a defence if lack of the consent of the victim is an element of the crime defined by law. In fact, the defence in such situations shall focus on the non-existence of the crime alleged to have been committed. Hence, consent cannot serve as a defense proper for affirmative defences are those defences which necessarily presuppose the commission of the crime alleged to have been committed but which are meant to challenge the appropriateness of punishment under the circumstance. For example, a person raising mistake of fact as a defence does not deny that he committed the said crime. He rather says punishing him is not proper for he committed the crime under a mistaken belief of the true fact of the situation. So, within the meaning of this, consent is not strictly speaking a defence in these jurisdictions. For instance, in these

[1] Wayne R. La Fave, and Austin W. Scott, Criminal Law: Handout, west Publishing Company, USA, 1972, P-408.
[2] Ibid

jurisdictions it is claimed that consent is a defense against charge for the crime of rape.[3] A person raising the issue of consent shall not be punished not because consent is a defence but because the alleged crime by itself does not exist. Therefore, for consent of the victim to serve as a defence it shall not be an element of the crime committed.

With this general remark let's consider the position of our legal system. Under the 1957 penal code the consent of the victim was not recognized as a defence even under exceptional circumstances.[4] In fact, this position of the legislature was contrary to many special part provisions of the Code. Presumably, courts were avoiding the absurdity that the application of the clear meaning of art.66 would entail by interpretation, by letting the special part prevail.[5]

The criminal code rectified the problem of the 1957 penal code by permitting consent as a defence. As a rule, it prohibits consent from serving as a defence. (The *a contrario* reading of Art.70, first paragraph). It provides that consent of the victim is a defence if the crime committed is a crime punishable upon the complaint of the victim or his legal representative.[6]

Art.70 of the criminal code categorizes crimes into two: those which are punishable only upon complaint and those which are punishable even in the absence of complaint from the victim or his legal representative. The first category of crimes is crimes against rights which are relatively protected while the second is about crimes against right which are absolutely protected.[7] For example, under the Criminal Code homicide, rape, and theft are liable to punishment whether the victim has lodged complaint or not. Hence, the rights protected by the laws defining these crimes (Arts. 598ff, 620&665) are absolutely protected rights.

---

[3] Ibid
[4] Art.66,1957 Penal Code
[5] Peter L. Strauss, "Interpreting the Ethiopian Penal Code", Journal of Ethiopian Law, V 5, No2, 1968, P.397
[6] Art.70, criminal code the Federal democratic Republic of Ethiopia, 2004
[7] Graven Philippe, An Introduction to Ethiopian Penal Code; Faculty of Law, Haile Sillassie I University, A.A, Ethiopia, 1965, P.187.

On the other hand, the commission of certain crimes calls the attention of the law only if the direct victim of the criminal act lodges a complaint to the effect that the criminal be punished .For instance, if crimes defined under Arts. 580,625 and 686 of the criminal code are committed; the criminal is liable to punishment only if the direct victim complains.

But if criminal matters are public matters, why is the complaint of the victim required? The justification is not because crimes which are punishable upon complaint do not affect the public, but the prosecution of such crimes will affect the victim again.[8] For example, if the crime committed is adultery (Art 652) the adulterous spouse will be punished if the other spouse complains. If he/she for different reasons keeps quiet, there will not be any punishment. If the adulterous spouse is prosecuted, the other spouse may sustain damage like publicity, in particular, if the person is a well-known figure in the community. Hence, the requirement of complaint is meant to avoid double harm to the victim, not because the crime is innocent to public interest.

The criminal code provides for another circumstance under which consent can serve as a defence. Under Art.555 (2), for example, if a person removes one of the essential organs of the victim, he will be liable to punishment of not greater than fifteen years rigorous imprisonment or by simple imprisonment not less than one year. But under Art.70(2) it is provided that the victimizer can raise the defence of the consent if the removal is for personal use of another person or for appropriate scientific research to be conducted by a legal person and also the victim does not have commercial purpose in disposing his body or part thereof. If the victimizer is securing part of the body of the victim for commercial purpose, he cannot raise consent as a defence notwithstanding that the victim does not have commercial purpose in the disposition of the organ of his body (Art.573(2)).

Therefore, unlike the 1957 penal code which never permitted consent as a defence, the criminal code allows consent as a defence under two circumstances: when the crime committed is punishable only upon complaint and when the harm caused is bodily injury and it is caused upon the consent of the victim free of commercial purpose and for scientific and research purposes or for personal use of an other person.

Philippe Graven, "Prosecuting Criminal Offences Punishable only upon Private Complaint", Journal of Ethiopian Law, V.2 No 1, P 121-127

Effective Consent

As it is indicated before, consent can serve as a defence only exceptionally. Even under this exceptional situation, it can serve as a defence only if it is effective.[9] The issue then is, when is consent effective? Consent is said to be effective only if two requirements are satisfied. First, it has to be given by a capable person.[10] If consent is given by a person who cannot make reasonable judgment as to the nature and consequence of the conduct to be performed onto himself, it cannot serve as a valid defence. Thus, a person cannot raise the consent of a minor, insane person, or even intoxicated person for such person[11] is deprived of his cognition at the time of his intoxication. The consent of these individuals cannot be a sustainable defence.

Under Art.70, capacity is not expressly provided as a condition. It is simply provided that consent given by the victim or his legal representative is a defence. But the expression "his legal representative" implies that the victim is not capable of giving a valid consent. Hence, impliedly capacity is made a requirement. So, if consent is to serve as a defence, it has to be secured from the victim himself or if he is incapable of giving sustainable consent, from his legal representative.

Besides, the second sub-article of Art.70 talks about *the conclusion of contract* to give consent. This also shows that capacity (the ability to make a reasonable judgment about the consequence of the act to be done) is a requirement. Otherwise, the contract concluded will be invalid.[12]

The second requirement for consent to be effective is the absence of defect. It is provided that consent which is affected by defect is not a defence.[13]Consent can be affected by defect if it is extorted by duress, fraud or mistake. The requirement is that consent has to be given out of the victim's own free will. If he is coerced or deceived or commits a mistake and, as a result, he gives his consent, the consent is not free and does not serve as a defence. It has to be noted that the mistake, to render the contract invalid, has to be the one

[9] Wayne R. La Fave and Austin W. Scott, cited above at note 2, PP. 408-9
[10] Ibid
[11] Ibid
[12] The Civil Code of the Empire of Ethiopia, 1960 Art. 1678(a)
[13] Wayne R. La Fave and Austin W. Scott, cited above at note 2,PP- 408-409

that the law wants to prevent. Hence, not any minor mistake that makes consent defective but the one that can affect the essence of the consent, that is, the one that would have prevented the victim from giving the consent had it been known to him. Under Art.70 of the Code, this requirement is not provided. In particular, the first sub-article simply refers to capacity (though implicitly) and leaves the issue of "defect" aside. But this does not mean that defective consent can serve as a defence. The element seems to be an inbuilt requirement of Art.70(1). Giving consent is a legal transaction and for this legal transaction the consent has to be willed, free of deceit and mistake.[14]

In fact, the second sub-article of Art.70 makes free consent a requirement. Because it talks about the conclusion of contract (valid contract) and under Arts.1678 (1) cum. 1696 of the civil code a contract can only be valid or enforeeable at law if it is free from defect (that is fraud, duress and mistake). As a result, for effective consent to exist under the criminal code, it shall not be affected by defect as provided under the provisions of the civil code on contracts.[15]

Time of giving consent

As indicated before, consent can serve as a defence only if it is effective, that is, if it is given by a capable person (or his representative) free of any defect. The next point worth considering is the time when effective consent can be given. Should consent necessarily be given before or at the time of doing the criminal act or does it suffice if it is obtained even after the fact. The general understanding is consent given after the fact cannot serve as a defence.[16] It simply amounts to ratification of the act for various reasons, such as the victim is compensated and the like. But prosecution is controlled by the public interest, not by victim's interest. Hence, in as long as the condonation or ratification is not made by the public, the victimizer shall be punished. Accordingly, satisfaction by the victim is not a bar to prosecution. For example, if the act envisaged under Art.70 (2) is committed, the actor can be prosecuted however the consent of the victim is obtained subsequent to the act.

---

[14] If the mistake is committed by the actor, for example, acting upon the consent of a person thinking that he is not a minor, the defence to be invoked shall be mistake of fact, not the consent of the victim.

[15] One may wonder the formality requirement for giving a valid consent. But it seems that consent can be expressed either orally or in writing unless there is a specific provision requiring written formality.

[16] Wayne R. La Fave and Austin W. Scott, cited above at note 2, P.410

The problem in our legal system arises with regard to crimes punishable upon complaint. In relation to these crimes, whether the consent is given before or at the time of or after the act, the effect is the same for the criminal: he will escape punishment. Because, no prosecution can be made against him unless there is complaint and obviously the victim will not complain if he is satisfied like by obtaining compensation. If he resorts to criminal proceeding none of the proceeds of such proceeding will accrue to his packet but in case of personal negotiation. So, in practice, subsequent consent is like a defense since it bars prosecution. Otherwise, the rule is consent is a defence only if it is obtained before or at least at the time of the act.

Of course, in some jurisdictions, it is expressly provided that condonation or ratification of the act is a defence for certain crimes, such as adultery and seduction followed by marriage.[17] But this type of express permission seems untenable. Firstly, the permission will be discriminatory as the rich can do anything and avoid punishment by his money while the poor cannot. The law shall treat the rich and the indigent alike. Secondly, such permission will be contrary to the purpose of criminal law to discourage criminals. The rich will not be discouraged because they can pay compensation: it may even embolden them to engage in repeated similar activities in as long as they are capable of giving satisfaction to victims. Thirdly, punishment presupposes the dangerous disposition of a criminal. If a person acts contrary to criminal law without obtaining the consent of the right holder in advance, he reveals his dangerousness. Hence, it would be unwise to expressly permit him to secure the victim's consent subsequently to avoid criminal liability. Therefore, ratification shall not serve as a defence, or at least it shall not be made an express defence. For instance, under our code ratification is indirectly a defence if the crime committed is the one punishable only upon complaint and the victim refrains from lodging his complaint. Under the 1957 penal code it is expressly provided that subsequent consent which has led to the conclusion of marriage is a defence for the crime of rape, indecent assault or seduction, abuse of the lady's state of distress or dependence upon another provided that the marriage is concluded freely and it is valid .Such provision is repealed by the criminal code and it is even logical to do so. Because, in particular a girl

[17] Id. P.411

who is raped, according to our culture has no other chance but to willy-nilly marry the rapist. This is quite contrary to the purpose of criminal law.

But the criminal code expressly makes subsequent consent a defence in relation to the crime of adultery. Art.652(1) of this Code stipulates that no proceeding shall be brought against the criminal if the complainant has condoned it or derived benefit from it. The criminal can, therefore, raise the condonation obtained from or satisfaction given to the victim subsequently to have any proceeding brought against him for adultery discontinued. All the same, it would be difficult to justify such express permission.

To summarize, under the criminal code consent is, as rule, not a defence. Exceptionally, however, it is made a defence on condition that it is effective (given by a capable person or his legal representative and free of defect) and if it is secured before or at the time of the act. Consent given after the fact can also have the same effect with consent given before or at the time of doing the act in relation to crimes which are punishable upon complaint.

B. Coercion

In any jurisdiction, law-makers must first determine their audience before proceeding to make criminal law. They shall ask themselves whether the law is for extremely hero or for extremely coward or for an average person. It would be self-defeating to make laws for both extremes. Hence, the law to be made shall not demand extreme heroism. Nor shall it encourage cowardice. It has to be the one that an average person finds easy to obey for it is only then that criminal law can achieve its purposes.[18]

Criminal law, the law for an average person, gives individuals due notices of the crimes together with the penalties the commission of such crimes will entail. Nonetheless, sometimes we see individuals disregarding the notice and committing the crimes defined by law. But it cannot be said that the notice is always disregarded out of one's own free will. At times, individuals violate the literal meaning of criminal law contrary to their will. This may happen when one person is compelled by another to violate the law.[19] In these

[18] Stephen A- Saltsburg, John L-Diamond, Kit Kinport, Criminal Law: Cases and Materials, 1994, USA, P.8
[19] Ibid

situations the criminal law lets them go unpunished. Thus, the defence of duress (coercion) is recognized in almost all legal systems. The justifications are the followings:

1- **Loss of Volition:** - A person who is coerced to commit a crime is a person who does not have a say on his act. Like an insane person or intoxicated person, he is totally deprived of his freedom of choice. Hence, he deserves the same treatment in as long as the loss of volitive power is unwilled.

2. **Social Benefit:** - Sometimes the permission of duress as a defence may be socially beneficial, in particular, where the harm avoided is greater. For instance, a person shall not be denied the right to invoke coercion as a defence if he saves his life at the expense of other's property right. In fact, it may be argued that he can raise necessity to avoid liability. But in most cases necessity is raised only if the triggering force is natural force.[20]

3. **Purpose of punishment:** If a person coerced is punished, he will not be deterred. Because, naturally, we all worry about an immediate dangers revolving around us, not about something to happen in the long run, that is punishment.[21] Hence, a coerced person in most cases submits to the unlawful demand of the coercer. If this is so, there is no reason to punish a coerced person.

4. **Disposition:** - Punishment presupposes that the criminal is a dangerous person. However, a coerced person is not dangerous since the crime is committed contrary to his will. Thus, it would not be untenable to recognize the defence of duress.

These are some of the justifications lying behind the defence of duress.

In Ethiopia, the defence of duress developed quite slowly. Because under the 1930 penal code (the first penal code), duress was not a defence at all regardless of its nature and intensity.[22]The coerced person was rather treated as a co-offender with the coercer.[23] So,

---

[20] Wayne R. La Fave and Austin W. Scott, cited above at note 2, P.381
[21] Philippe Graven, cited above at note 8, P-192
[22] Ibid.
[23] Ibid.

that code demanded heroism from any person. Nevertheless, this position was modified by the second penal code (1957). The 1957 penal code classified coercion into moral and physical. And Physical coercion which refers to coercion denying freedom of movement was permitted as a defence. Accordingly, a person who committed a crime being at a gun point could escape criminal liability.[24] On the other hand, moral coercion which denies the freedom of choice was not recognized as a defence. Rather it was recognized as a mitigating ground.[25]

Under the criminal code, however, coercion has become a full-fledged criminal law defence. Under Art.71, coercion is recognized as a defence regardless of its nature: physical or moral. Hence, as of may 1, 1997 E.C, everybody is entitled to avail himself of the defence of moral coercion as well. For the crime committed, only the coercer is liable as an indirect offender.[26]

Although it is claimed that duress is almost a universal defence, it is not a blanket defence. It can serve as a defence only conditionally. Some of these conditions are as follows.

1. **Source-** If compulsion is to serve as a defence it has to emanate from human agent.[27] If the compulsion emanates from extra human agents like fire and flood, it cannot be raised as a defence. In fact, it does not mean that the actor will be punished. He may be entitled to other defences like necessity.
2. **Absolute and irresistible:** - Since the law does not want to encourage cowardice, it demands relative and resistible coercion to be avoided.[28] No one is supposed to submit to the unlawful demand of a person where the coercion is not absolute and is resistible. Of course, absoluteness and irresistibility has to be checked by using the reasonable man standard. So, the coercion does not need to be absolute and irresistible for all human beings. To require this amounts to demanding extreme heroism, which would be contrary to the very existence of the defence.

[24] Art.67, first paragraph, 1957 penal code
[25] Art.67, 1957 Penal Code
[26] Art.32 (1) (a), criminal code
[27] Wayne R. La Fave and Austin W Scott, cited above at note 2, PP.374-378
[28] Philippe Graven, cited above at note 8, PP- 194-195

3. **Proportionality**- The defence of coercion is sustainable only if the coerced person causes a lesser damage.[29] But still there are some jurisdictions in which it is possible to cause proportional damage to the harm avoided. If, however, greater damage is caused, the defence will not be acceptable. The coerced person had better sustain harm than causing greater damage.
4. **Imminence**- coercion as a defence is accepted only if the damage feared is imminent, that is, very close. If the danger is not imminent the coerced person shall say no to the demand of the coercer. He has other alternatives to avoid the danger feared than by committing a crime. Therefore, a danger which is remote is resistible and submission to such coercion entails liability.
5. **Continuity**:-The defence of duress is permitted only if it exists throughout.[30] If there is interruption, the law expects the coerced person to make use of the gap to avoid the commission of a crime. Because the coercion at that moment becomes resistible and many alternatives to avoid the commission of the intended crime will came into picture.
6. **Fault**- In some jurisdictions, the defence is permitted only if the coerced person has not contributed by his own fault to the occurrence of the coercion.[31] But in others, the existence of coercion at the time of the commission of the crime suffices regardless of the contribution of the coerced person and provided that the other conditions are met.[32]

If the above conditions are satisfied duress can be raised as a defence irrespective of the type of injury avoided or caused. Of course, there are some Jurisdictions which limit the injury to be avoided to life and bodily integrity. But this is not wise in as long as the above requirements are fulfilled. Besides, the holder of the right protected is not material.

---

[29] ìNÃ ' Å. ¾""ÈM IÓ SW[L:©S'J<: Ø' 19 k" 1994¯.U u"ÓÉ T}T>Á É'Ïf: P.101.
[30] Philippe Graven, cited above at note 8, PP.173-5
[31] θሐይ ወዳ, cited above at note 30, P.103
[32] Wayne R. La Fave and Austin W. Scott, cited above at note 2, PP.173-5

Under Art.71 of the criminal code only some of the above conditions are expressly provided. Firstly, it is provided that the coercion has to be absolute and irresistible (ሊቋቋመው በማይችለው መንገድ ፍጹም ተገድዶ). It is also provided that the court has to take the type of coercion, circumstances and age of the coerced person, the relationship of the strength of the coerced and the coercer and other factors into account to determine whether the coercion is absolute and irresistible. Secondly, the law expressly mentions proportionality by using the expression "without causing greater harm than he could have suffered" (ሊደርስበት ከነበረው ጉዳት በማይበልጥ) as a condition to avail oneself of the defence.

The other requirement which is provided is that the duress has to emanate from another person. Because Art.71, first paragraph, refers to Art. 32(1) (a) which talks about persons committing crimes by using other human beings as means. In addition, the second paragraph of Artt.71 implies that the coercer has to be a human person by using expressions like "the relationship between the strength of the two persons"

The remaining requirements are not expressly stated by the criminal code under Art.71. Therefore, whether they have to be taken as conditions or not remains a matter of interpretation. But it seems that the requirements of imminence and continuity are inbuilt requirements of Art.71. Because in the absence of the two requirements the coercion can hardly be absolute and irresistible. Hence, absoluteness and irresistibility cover the conditions of imminence and continuity. This can best be inferred by cumulatively reading Arts.71 and 72. If one of these requirements is missing the coercion becomes resistible and entitles the person subjected to it only to compulsory mitigation (Art.72)

The requirement of fault is, however, very difficult to infer from Arts.71 and 72. Nonetheless, it can be argued that fault is a requirement for individuals are not permitted to benefit from their wrongs. On the contrary, it can also be argued that fault is not a requirement. Instead, what matters is the position of the criminal at the time of committing the crime. If he was totally deprived of his volitive power, he has to be allowed to invoke the defence. But in the field of criminal law, since the rule of "strict construction" is applicable, the second position, for our purpose, seems tenable. Therefore, coercion can

serve as a defence even if the fault of the coerced person has contributed to the occurrence of the coercion. For example, a person who joins the group of robbers can raised coercion as a defence if he is forced contrary to his will to commit a crime with them.[33]

Interestingly, the criminal code is not comprehensive on the defence of compulsion. Normally, the defence is permitted whether the right safeguarded belongs to the coerced person or third party upon the fulfillment of the certain conditions. For the criminal code, however, the defence can be invoked only if the right at stake belongs to the actor himself. It uses the expression *he could have suffered* (ዓሲ.ደርስበት ከነበረው ጉዳት) instead of saying *that could have occurred* (ሊደርስ ከነበረው ጉዳት) which limits the defence to actions taken to safeguard only one's own interest. So, this defence cannot be raised, at least, by reading the clear meaning of Art.71. Of course, it is not a wise requirement, in particular, if the other requirements are met. All the same, the limitation of the defence may be an oversight. Because such limitation was not made even under the 1957 penal code even though moral coercion was not a defence. At any rate, individuals committing crimes for the sake of protecting others rights are entitled at least go compulsory mitigation (Art. 72)

D. Necessity

The pressure of natural forces may sometimes confront a person in an emergency with a choice of two evils: to violate the clear meaning of criminal law and produce a harmful result, or to comply with the law and let greater or equal or lesser harm occur.[34] As a matter of social policy, if the law is violated to avoid grater harm, the violator will not be punished unless the emergency situation is created by his own fault.[35] In the absence of fault on his side his act is considered to be necessary to the society and hence justified. So a necessary act is a non-condemnable act though contrary to law. Because condemnation is based on the cost-benefit analysis of the society. If there is societal benefit there will not be condemnation. The society accepts and even encourages acts bringing about societal benefits, such as necessary acts. Therefore, necessity is among the affirmative criminal law defences.

---

[33] If the agreement by itself constitutes a crime (of conspiracy), he will be answerable therefor.
[34] Philippe Graven, cited above at note 8, P. 208
[35] Wayne R. La Fave and Austin W. Scott, cited at note 2, P.381

The defence of necessity is recognized under Art.75 of the criminal code. The provision stipulates that a person performing a necessary act is not liable to punishment. Of course, the law does not make necessity a blanket defence. It requires the fulfillment of certain conditions.

Imminence:-The law demands the danger feared to be imminent or very close. The defence of necessity applies only where a person is in an emergency situation and faced with the choice of two evils. If the available choices are more than two, like if there is a third choice which can be used to avoid the danger instead of disobeying the law, the defence of necessity will not exist. Necessity is a defence only if the law is violated upon the disappearance of hope to exploit or other way outs. For instance, a starving man

cannot raise necessity as a defence because he has other alternatives to avert the danger (starvation) like begging. So, in as long as there are other possibilities to resort to the law shall not be violated.

B. **Seriousness**. The law also requires the danger to be averted to be *serious* (ከባድ ከሆነ አደጋ ለማዳንን). In fact, what constitutes *'serious'* is vague and relative. For a very poor person, any danger revolving around a thing which worth $10 may be serious while for a rich man it is a negligible danger. Even the very stipulation of this requirement seems unwise. Because the justification of the defence is based on social benefit and it is immaterial whether the danger at hand is serious or not in as long as the society gets benefit when criminal law is disobeyed. For example, a person violating the law and affecting an interest which worth $5 shall be permitted to raise the defence of necessity if the interest he safeguards worth more, like $10. Of course, it can be argued that the 'seriousness' requirement is made to require causing lesser damage by avoiding greater damage (or may be to discourage law violators). But this is an argument based on interpretation. The clear meaning of the law requires the danger feared to be serious when considered independently.

C. **Fault**:-Under Art.76 of the code, it is provided that the defence of necessity ceases to exist if the emergency situation is created by the fault of the actor. The code

stipulates that *if the actor, by his own fault, placed himself in the situation involving danger or necessity in which he found himself* (አድራጊው የተገኘበት አስገዳጅ ሁኔታ ወይም የአደጋ ሁኔታ በራሱ ጥፋት የመጣ እንደሆነ) he will be entitled to mitigated penalty, not exoneration. So, the absence of fault on the side of criminal is another requirement to avail himself of the defence of necessity. If a person intentionally creates the situation of necessity, he will be held liable for intentionally causing the harm eventuated. If he by his negligence produces the state of emergency triggering the necessary act, he will be liable for causing the harm by negligence provided that the negligent doing of the act is punishable. For instance, a person driving at an excessive speed cannot raise necessity as a defence if he runs-over a pedestrian to save the passengers in the car. Because he is at fault and his fault has produced the problem. It has to be noted that a person who commits a crime being in a state of necessity is not to be treated alike with others though the necessity is created by his fault. Art.76 provides that he is entitled to mandatory optional mitigation (Art.180).

D. **Intention:-** A necessary act is an intentional act.[36] If an act is not performed with the intention to avert certain danger, it cannot amount to a necessary act. This requirement is implied under Art 75. The article defines a necessary act as an act which is performed to protect a legal right from immanent and serious danger. (የራስን ወይም የሌላ ሠውን መብት በቅርብ ከሚደርስ ከባድ ከሆነ አደጋ ለማዳን የተፈፀመ ድርጊት.... አያስቀጣም). The expression *to protect* (ለማዳን) implies that the act has to be performed with the sole objective of averting the imminent danger at hand. Accordingly, if 'X' kills 'Y' for retaliation and later on he discovers that by killing 'Y' he saved 'R' and 'S,' he cannot raise necessity as a defence. The lives of the two individuals are saved incidentally.

E. **Source:-**In some jurisdictions, it is provided that a necessary act is a reaction against natural forces such as storm, fire, flood, starvation, landslide, etc.[37] Thus, actions taken against human forces do not constitute necessary acts. Under Arts.75 and

[36] Id. P.386
[37] Stephen A. Saltsburg, John L. Diamond, kit kinports, Thomas H. Morawetz,cited above at note P.786

76, however, such requirement is not stipulated either expressly or tacitly. Hence, it can be argued that the defence of necessity can extend to reactions against human forces provided that these forces are not covered by Arts 71 (coercion), 73 (superior order) and 78 (legitimate defence).[38]

F. Proportionality. The underlying justification for the defence of necessity is social policy, that is, the act benefits than harming the society. But in some legal systems, the defence is extended to the situations where the society is indifferent.[39] That is to say, individuals causing proportional harms are allowed to benefit from the defence. Under the criminal code, the requirement of proportionality is not provided. But under Art.76 there is an ambiguous expression which excludes necessity and rather entitles a person to mitigated punishment. The expression reads: *if the encroachment upon third party's rights exceeded what was necessary...* (በሌላው ሠው መብት ላይ የተደረገው ጉዳት ካስፈላጊው መጠን በላይ እንደሆነ...). The underlined expression may have two meanings. Firstly, it means that what is done shall not be is excess of what renders an act a necessary act, that is, it has to be lesser according to the justification of the defence. Secondly, causing equivalent harm is possible if such harm is necessary under the circumstance. So, it is just a matter of interpretation to take proportionality into account. But in light of the rationale behind the recognition of the defence, the first interpretation seems tenable.

G. **means used**:-Under Art.75 it is provided that a person in an emergency situation shall use a means proportionate the requirement of the case. If the means is disproportionate under the circumstance, obviously excess of necessity will come into picture. Hence, a person who can cause bodily injury by using his fist to avert certain danger shall not use bullet, or if killing with a bullet is possible, hand-bomb shall not be used. Interestingly enough, the English Version of the criminal code does not recognize this requirement. So, there is seemingly a contradiction between the two versions. But according to the Federal Negarit Gazeta Establishment Proclamation No. 3/1995 (Art.2(4)), whenever there is discrepancy between the two versions the Amharic version prevails. Hence the

[38] It is claimed that necessity in its broader sense include all of them.
[39] iNÃ Ç, cited above at note 30, P.117

requirement of the means used has to be satisfied for the defence of necessity to exist.

At any rate, if the requirements provided both under Art.75 and Art.76, either expressly or impliedly, are met, necessity can successfully be raised as a defence. The types of harms avoided and caused are irrelevant. If the requirements are, however, not satisfied the defence does not exist. Instead, excess of necessity may exist like if the state of necessity does not exist because the danger is not imminent, or it is created by the fault of the actor, or the measure taken is in excess of what is necessary. Excess of necessity entitles the actor only to a mitigated penalty.

Under the 1957 penal code, the defence of necessity covers everyone in a state of emergency.[40] So, its scope was wide enough. Under the criminal code, however, the scope of the defence is somehow limited. The second paragraph of Art.75 provides for an exception where necessity is not a defense notwithstanding that all the necessary conditions to raise the defence are met. The law stipulates that necessity cannot be invoked by persons who have special professional duty to protect life or health. Indeed, the existence of necessity entitles them to mitigation, not to exemption from liability. Accordingly, if a given boat has some people in excess of its carrying capacity and as the result it is about to drown, it is possible to throw some of the people to the sea to save the lives of others. But according to the exception, except for the crew members who are necessary to navigate the boat, others must be sacrificed first. Among themselves, they the crew members may draw lots. Then the lives of the passengers have to be saved at the expense of their lives. In fact, the death is the risk that they assume at the time of their recruitment. They shall not breach the special duty imposed upon them to take care of others' life and health. If the duty is breached, they will be liable to punishment even if the punishment is to be extenuated (180). Therefore, the criminal code has reduced the scope of the defence of necessity.

Conclusion

Sometimes, the performance of criminal activities may be initiated by the victims themselves. Accordingly, criminals may claim exoneration from criminal liability on the

[40] Art. 71, 1957 Penal Code

ground of such initiation (consent). However, since criminal matters are public (not individual) matters, such initiation or consent is not, in principle, recognized as a defence. All the same, under exceptional circumstances, consent of the victim is recognized as a defence provided that it is sustainable at law; that is, if it is free from defect and given by a capable person or his legal representative. In Ethiopia, before the enactment of the criminal code, the defence of consent was not recognized even under exceptional circumstances. The criminal code has, however, recognized this defence under certain circumstances (such as in relation crimes punishable only upon private complaints) on condition that some requirements are met.

Moreover, criminal activities may at times be the result of coercion. In principle, individuals whose criminal activities are attributable to such coercion are excused if the circumstances under which they perform such activities justify the excuse. In our legal system, the excuse of coercion developed quite gradually. It was not recognized under the 1930 penal code while it was recognized only partly under the 1957 penal code. The criminal code has, nonetheless, recognized the excuse of defence fully but with a reduced scope in relation to the holder of the interest to be protected.

Finally, the defence of necessity is one of the criminal law defences that individuals can raise to avoid criminal liability upon the fulfillment of certain conditions. This defence was recognized under both the 1957 and 2004 codes. But the criminal code, unlike the 1957 penal code which extends the defence to everybody, has restricted the scope. As a result, some individuals (persons with special professional duty to protect life and safety of others) are excluded from the scope of the defence. All the same, they are still allowed to get some benefits; that is, they are entitled to mitigated penalties.